United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1904.

No. 1400.

No. 19, SPECIAL CALENDAR.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS,
APPELLANTS,

vs.

HARRY F. HARRIS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 30, 1904. 9500

In the Court of Appeals of the District of Columbia.

GEORGE F. ELLIOTT ET AL., Appellants,
vs.
HARRY F. HARRIS.
} No. 1400.

a Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. No. 356. *Habeas Corpus.*

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Petition for Writ of Habeas Corpus.*

Filed December 9, 1903.

In the Supreme Court of the District of Columbia:

In the Matter of HARRY F. HARRIS. *Habeas Corpus.* No. 356.

To the honorable the supreme court of the District of Columbia:

Your petitioner, George F. Harris, respectfully represents:

First. That he is a citizen of the United States and a resident of the State of Maryland, and is the father of Harry F. Harris.

Second. That the said Harry F. Harris, is an infant under the age of twenty-one years, and being such infant, on or about July 27th, 1903, without the consent or knowledge of petitioner, enlisted in the Marine Corps of the United States, said enlistment being made at the Marine barracks, Washington, D. C., on said day, and the said Harris is now in the said Marine Corps and in the care and custody of Brigadier General George F. Elliott, who is commander of the Marine Corps and in the immediate care and custody of Major Randolph Dickens, commandant at the Marine barracks, Washington, D. C. and that the said Harry F. Harris is in the District of Columbia and is under the care and control of the said persons aforesaid.

Third. That your petitioner is the father of the said Harry F. Harris, has never relinquished his claim as such and is, by law, entitled to the legal care and custody of the said Harry F. Harris until he arrives at the age of twenty-one, the said Harris, at
2 the present time, being of the age of nineteen; and that as such father and person, entitled to the exclusive care and custody of the said Harry F. Harris, he has demanded of the persons at the present time detaining him, that he be released and returned to the care and custody of the said petitioner, but that the said parties aforesaid claim*ing* to detain the said Harry F. Harris on account of the fact that he has enlisted in said Marine Corps.

Fourth. Your petitioner is advised and being advised believes that the said Harry F. Harris had no authority to enlist in said Marine Corps without the consent of petitioner, and that he had no authority in this way to deprive petitioner of the care and custody of his person, and that the said parties aforesaid, Brigadier General George F. Elliott and Major Randolph Dickens, are unlawfully detaining the said Harry F. Harris, and your petitioner, being without remedy save in this honorable court, respectfully prays:

1. That a writ of *habeas corpus* be directed to the said Brigadier General George F. Elliott, and Major Randolph Dickens, commandant, commanding them and each of them to produce in court the body of the said Harry F. Harris forthwith, and show cause, if any they have, for his detention.

2. That the said Harry F. Harris be discharged from the unlawful care and custody of the said parties aforesaid.

3. And that your petitioner may have such other and further relief as the nature of his petition may require.

GEORGE F. HARRIS.

LAMBERT & BAKER,
Attorneys for Petitioner.

3 DISTRICT OF COLUMBIA, *ss:*

I, George F. Harris, being first duly sworn, on oath depose and say that I have read over the foregoing petition by me subscribed and know the contents thereof; that the matters and facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

GEORGE F. HARRIS.

Subscribed and sworn to before me this 9th day of December, A. D. 1903.

CHARLES R. BURHANS,
Notary Public, D. C.

[SEAL.]

Endorsed: Let the writ of *habeas corpus* issue returnable at 10 o'clock a. m. on the 11th day of Dec. A. D. 1903. Harry M. Clabaugh, chief justice.

4 In the Supreme Court of the District of Columbia.

In the Matter of the Petition for Writ of *Habeas Corpus* for HARRY F. HARRIS. No. 356.

The President of the United States to Brigadier Gen'l George F. Elliott & Major Randolph Dickens, Greeting:

You are hereby commanded to have the body of Harry F. Harris detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable Harry M. Clabaugh chief justice of the supreme court of the District of Columbia, at the United States court-house, city of Washington, on the 11 day of December, 1903, at 10 o'clock a. m., after the receipt of this writ, to do and receive whatever shall then and there be considered of in — behalf, and have then and there this writ.

Witness, the Honorable Harry M. Clabaugh, chief justice of said court, the 9 day of December, A. D. 1903.

[SEAL OF COURT.]

JOHN R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

[Endorsed:] No. 356. *In re* Harry F. Harris. Writ of *habeas corpus*. Issued Dec. 9, 1903. Returned ——, 1903. Served copy of within writ on within named George F. Elliott and Randolph Dickens Dec. 9, 1903. Aulick Palmer, marshal. B.

5 *Return of Respondents.*

Filed December 11, 1903.

In the Supreme Court of the District of Columbia.

In re the Petition for Writ of *Habeas Corpus* for HARRY FRED HARRIS. No. 356.

To the Honorable Harry M. Clabaugh, chief justice of said court:

The respondents in said case, Brigadier General, Commandant George F. Elliott, United States Marine Corps, and Major Randolph Dickins, United States Marine Corps, commanding officer, Marine barracks, Washington, District of Columbia, upon whom has been served the writ of *habeas corpus* therein issued, respectfully make return to the same, and state to this honorable court that they hold the above named Harry Fred Harris by the authority of the United States, as a private in the Marine Corps of the United States under circumstances as follows:

To wit: That the said Harry Fred Harris was, at Washington, District of Columbia, on, to wit, the twenty-seventh day of July, nineteen hundred and three, duly enlisted in the United States Marine Corps as a private marine in said corps for the term of four years from the said date of enlistment, certified copies of said enlistment paper being hereto attached marked "Exhibit A."

That, at Washington, District of Columbia, on the ninth day of December, nineteen hundred and three, the said Harry Fred
6 Harris did state to the said Major Randolph Dickins, his then commanding officer, that he, the said Harry Fred Harris, was at the time of his enlistment on the twenty-seventh day of July, nineteen hundred and three, as aforesaid, under the legal age of twenty-one years, to wit of the age of nineteen years, although he, the said Harry Fred Harris, on the date of his said enlistment as aforesaid, did solemnly swear that he was twenty-one years and six months of age on said date of enlistment; that since the date of his enlistment as aforesaid he, the said Harry Fred Harris, has fraudulently received pay and allowances from the United States, thereby committing the crime of fraudulent enlistment and fraudulent receipt of pay and allowances against the statute of the United States in such case made and provided.

That on the ninth day of December, nineteen hundred and three, the said Harry Fred Harris was thereupon duly committed by said Major Randolph Dickins, United States Marine Corps, to the guardhouse at the barracks aforesaid to await action on the charge of fraudulent enlistment and fraudulent receipt of pay and allowances.

That a charge for his said fraudulent enlistment and fraudulent receipt of pay and allowances, a copy of which is hereto attached marked "Exhibit B," has been duly preferred against the said Harry Fred Harris with a view to his trial thereon by a general court-martial; and that it is proposed to bring him to trial thereon without unreasonable delay by and before a general court martial.

In obedience, however, to the said writ, the respondents herewith produce before this honorable court the body of the said
7 Harry Fred Harris for such disposition and orders as by this court may be deemed to be legally required and appropriate.

G. F. ELLIOTT,
Brigadier General, Commandant, United States Marine Corps, Respondent.
R. DICKINS,
Major United States Marine Corps, Commanding Marine Barracks, Washington, District of Columbia, Respondent.

Dated at Washington, District of Columbia, on the tenth day of December, nineteen hundred and three.

8 EXHIBIT "B."

U. S. MARINE BARRACKS,
WASHINGTON, D. C., *December* 10, 1903.

SIR: 1. I have the honor to hereby prefer charges against Private Harry Fred Harris, United States Marine Corps, for fraudulent enlistment in said corps and for the fraudulent receipt of pay and allowances under said enlistment, the facts being as follows:

On the twenty-seventh day of July, nineteen hundred and three, the said Harry Fred Harris was enlisted into the United States Marine Corps, at Washington, District of Columbia, by Colonel George F. Elliott, United States Marine Corps, for the period of four years from said date of enlistment, he, the said Harry Fred Harris having sworn that he was, on said date, twenty-one years and six months of age. On the ninth day of December, nineteen hundred and three, the said Harris having previously been detailed for duty by the undersigned with the marine guard of the U. S. S. Iowa, and having endeavored to avoid such duty, appeared before the undersigned and alleged that he was but nineteen years of age when enlisted.

2. The premises considered, I respectfully recommend that Private Harry Fred Harris, United States Marine Corps, be brought to trial before a general court-martial for the offenses heretofore indicted.

3. Pursuant to paragraph 1073, U. S. Navy Regulations, 1900, I have the honor to enclose herewith the statement of the ac-
9 cused, together with such list of witnesses as he desires to submit.

Very respectfully,
(Signed) R. DICKINS,
Major U. S. Marine Corps, Commanding Marine Barracks.

The brigadier general, commandant, United States Marine Corps, headquarters, Washington, D. C.

I certify that the above is a true copy.

G. F. ELLIOTT,
Brigadier General, Commandant, U. S. Marine Corps.

10 EXHIBIT "C."

STATE OF ——, }
District of Columbia, }

TOWN OF ——, }
Washington. }

I, Harry Fred Harris, born in United States, State of Maryland, county of Montgomery, town of —— aged twenty one years, and by occupation a plumber, do hereby acknowledge to have voluntarily enlisted, this twenty-seventh day of July, 1903, as a private in the United States Marine Corps, U. S. Navy, for the period of four years, unless sooner discharged by competent authority; do also agree to accept such bounty, pay, rations, and clothing as are or may be established by law. I further agree to accept and acknowledge all acts of Congress relating to the United States Marine Corps from its organization to these presents, and also such other act or acts as may hereafter be passed by the Congress of the United States having relation to the Marine Corps of the United States during the term of my enlistment. And I, Harry Fred Harris, do solemnly swear that I will bear true allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies and opposers whomsoever, and observe and obey the order of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the Army and Navy of the United States; and further, that I am the full age of twenty-one.

(S'g'd) HARRY FRED HARRIS.

Sworn and subscribed to at Washington, D. C. this 27th day of July, 1903, before me,

(S'g'd) G. F. ELLIOTT,
Colonel U. S. Marine Corps, Marine Barracks,
Washington, D. C.

July 27th, 1903.

11 I certify that the recruit was inspected previously to his enlistment, and that he was entirely sober when enlisted; that to the best of my judgment and belief, he is duly qualified to perform the duties of an able-bodied soldier.

Remarks: ——.

(S'g'd) G. F. ELLIOTT,
Colonel U. S. M. C., Recruiting Officer.

Declaration of Recruit.

I, Harry Fred Harris, desiring to enlist in the United States Marine Corps for the term of four years, do declare that I am twenty-one years and six months of age; that I am not married; that I have never been discharged from the United States service on account of disability, or by sentence of a court-martial, or by order, before the expiration of the term of enlistment, and I know of no impediment to my serving honestly and faithfully as a marine for four years.

Given at Washington, D. C. the 27th day of July, 1903.

(S'g'd) HARRY FRED HARRIS.

Witness:

(S'g'd) C. F. BAESSELL,
Gunnery-Sergeant U. S. M. C.

(On margin.)

Name of next of kin (mother) Mrs. Fred Harris,
Address Takoma Park, Montgomery Co., Md.
Transferred from recruiting rendezvous to ——.
A true copy:

G. F. ELLIOTT,
Brigadier General, Commandant, U. S. Marine Corps.

12 *Replication.*

Filed Dec. 23, 1903.

In the Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. *Habeas Corpus.* No. 356.

The petitioner joins issue on the return filed in this cause.

LAMBERT & BAKER,
Attorneys for Petitioner.

It is hereby agreed that this replication may be filed this day as of the day of the filing of the return *nunc pro tunc.*

MORGAN H. BEACH,
J. C. ADKINS,
Attorneys for the Respondents.

13 *Stipulation of Counsel.*

Filed in Open Court December 22, 1903.

In the Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. *Habeas Corpus.* No. 356.

It is hereby stipulated and agreed by and between counsel or the respondents and petitioner herein, that at the hearing of this cause, upon petition, return and replication, the petitioner offered to prove that when Harry F. Harris enlisted in the Marine Corps of the United States he was a minor below the age of twenty-one years, to wit of the age of nineteen years, and that at the time of such enlistment he was living at home with his father and had not been emancipated by his father, and that the arrest mentioned in the return did not occur until after the service of the writ of *habeas corpus* upon respondents, but the respondents admitted the said facts and no witnesses were produced to prove the same; and that there was no other evidence offered or presented at said hearing.

LAMBERT & BAKER,
Attorneys for Petitioner.
MORGAN H. BEACH,
J. C. ADKINS,
Attorneys for Respondents.

14 *Order Discharging, &c.*

Filed in Open Court December 22, 1903.

In the Supreme Court of the District of Columbia.

In the Matter of the Petition for Writ of *Habeas Corpus* for HARRY F. HARRIS. *Habeas Corpus.* No. 356.

This cause came on to be heard upon the petition for a writ of *habeas corpus*, the writ thereon issued the return of respondents herein filed and the replication thereto and testimony as per stipulation filed and all other the proceedings herein; was argued by counsel for the respective parties and submitted to the court December 11th 1903.

Upon consideration whereof, it is this 22d day of December A. D. 1903, adjudged and ordered that Harry F. Harris, be discharged from the custody of the respondents.

HARRY M. CLABAUGH,
Chief Justice.

From the foregoing the respondents by their counsel in open court, note an appeal to the Court of Appeals of the District of Columbia, this 22d day of December 1903, and the said Harry F. Harris, is thereupon required to furnish bond in the penalty of one hundred and fifty (150) dollars, with surety or sureties to be approved by this court, to answer for his appearance in said Court of Appeals.

HARRY M. CLABAUGH,
Chief Justice.

15 *Memorandum.*

December 22, 1903.—Recognizance in the penalty of $150.00 with Wm. W. Stewart as surety, filed.

16 *Notice of Appeal and Order for Citation.*

Filed January 13, 1904.

In the Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. No. 356. *Habeas Corpus.*

The respondents Brigadier General, Commandant, George F. Elliott, United States Marine Corps, and Major Randolph Dickins, United States Marine Corps, commanding officer, Marine barracks, Washington, District of Columbia, by direction of the Secretary of the Navy and the Attorney General of the United States, note an appeal to the Court of Appeals of the District of Columbia from the order discharging Harry F. Harris.

The clerk will issue a citation to the said Harry F. Harris.

MORGAN H. BEACH,
U. S. Attorney, D. C., Attorney for Respondents.

17 In the Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. No. 356. *Habeas Corpus.*

The President of the United States to Harry F. Harris, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 13th day of January, 1904, wherein George F. Elliott and Randolph Dickins, are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Harry M. Clabaugh, chief justice of the supreme court of the District of Columbia, this 13th day of January, in the year of our Lord one thousand nine hundred and four.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this — day of ——, 190–.

——— ———,
Attorney for Appellee.

[Endorsed:] No. 356 H. C. In the matter of Harry F. Harris. Citation. Issued Jan'y 13, 1904. Served cop- of the within citation on Jan'y 14, 1904. Service accepted. Lambert & Baker, attorneys for petitioner & appellee. ——— ———, marshal. Morgan H. Beach, attorney for appellants.

18 *Order to Prepare Transcript of Record.*

Filed January 13, 1904.

In the Supreme Court of the District of Columbia.

In the Matter of HARRY F. HARRIS. No. 356. *Habeas Corpus.*

The clerk will please prepare the transcript of record for filing in the Court of Appeals, and will include therein:
The petition for writ of *habeas corpus;*
Writ of *habeas corpus;*
Return of respondents and exhibits;
Replication;
Stipulation of counsel;
Order discharging Harry F. Harris and fixing bond;
Notice of appeal; and
Citation.

MORGAN H. BEACH,
U. S. Att'y, D. C., Attorney for Respondents.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of

this record, in cause No. 356, *habeas corpus*, In the matter of Harry F. Harris, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of January, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1400. George F. Elliott *et al.*, appellants, *vs.* Harry F. Harris. Court of Appeals, District of Columbia. Filed Jan. 30, 1904. Henry W. Hodges, clerk.

Henry W. Hodges
Ex Esq.

Court of Appeals, District of Columbia.

APRIL TERM, 1904.

No. 1400.

No. 6, Special Calendar.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS,
APPELLANTS,

vs.

HARRY F. HARRIS.

BRIEF FOR APPELLANTS.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.

JESSE C. ADKINS,
Assistant United States Attorney for the

Court of Appeals, District of Columbia.

APRIL TERM, 1904.

No. 1400.

No. 6, Special Calendar.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS,
APPELLANTS,

vs.

HARRY F. HARRIS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

On July 27, 1903, the appellee, desiring to enlist in the Marine Corps of the United States, made declaration on oath before the proper authorities that he was 21 years and 6 months of age, and, being found qualified by the recruiting officers, was on that day enlisted as private in the "United States Marine Corps, U. S. Navy," for the period of four years (enlistment papers, Rec., 6, 7).

On December 9, 1903, the father of the appellee filed his petition in the supreme court of the District of Columbia for the writ of *habeas corpus* to secure the discharge of appellee from the custody of the appellants, Brigadier General George

F. Elliott, commandant of the Marine Corps, and Major Randolph Dickins, commanding the marine barracks, Washington, D. C. (R., 1).

Petitioner alleged that he was the father of appellee, and had never relinquished his claim as such, and was entitled to the legal care and exclusive custody of his son, who was an infant of the age of 19 years; that on July 27, 1903, the appellee, without the consent or knowledge of petitioner enlisted in the Marine Corps at Washington, D. C., and was then in the custody of appellants; that he was advised and believed that appellee had no right to enlist without his consent, and that he had demanded of appellants the release of appellee, and that appellants were illegally and without authority depriving him of the custody of his son (R., 1, 2).

Upon the filing of this petition the writ issued, and in obedience thereto the appellants on December 11, 1903, produced the body of appellee in court with their return. In this they alleged that they held appellee by virtue of the authority of the United States as a private in the Marine Corps, in which he was on July 27, 1903, duly enlisted as a private for the term of four years, and a certified copy of the enlistment papers was attached to the return (R., 3, 4, 6, 7).

It was further alleged in the return that on December 9, 1903, the appellee was charged by appellant Dickins with the offense of fraudulent enlistment into the Marine Corps and the fraudulent receipt of pay and allowances, and was duly committed to the guard-house, and was then held to await action on that charge. A copy of the letter from appellant Dickins to appellant Elliott making said charge and recommending the court-martial of appellee was attached to the return as Exhibit B (R., 4, 5).

On this return issue was joined (R., 7).

Thereupon the petitioner offered to prove that when appellee was enlisted he was of the age of 19 years and had not been emancipated by his father. These facts were fully alleged in the petition, and were not denied by the return.

They were therefore admitted by appellants without proof (stipulation, R., 8).

Petitioner also offered to prove that the arrest of the appellee upon the charge of fraudulent enlistment mentioned in the return was made after the service of the writ of *habeas corpus*. This was also admitted to be true (R., 8).

No other evidence was offered or presented at the hearing (R., 8).

After argument and consideration, the court below held that the enlistment of appellee, a minor, without the knowledge or consent of his father was void, and made an order discharging him (R., 8).

From this order this appeal was taken, and the court below required the appellee to give bond to answer the judgment of this court.

The opinion of Mr. Chief Justice Clabaugh in discharging appellee will be found on pages 11 to 14 of the brief of appellants in opposition to the motion to dismiss or affirm this appeal.

ASSIGNMENT OF ERRORS.

1. The court below erred in discharging the appellee.

2. The court below erred in refusing to remand the appellee to the custody of the appellants.

3. The court below erred in holding that the enlistment of a minor in the Marine Corps of the United States without the consent of his father is void.

4. The court below erred in refusing to hold that the appellee was enlisted "to serve in the navy."

5. The court below erred in holding that the appellee was enlisted into "the military service of the United States."

6. The court below erred in discharging appellee before he was tried by court-martial for the offense of fraudulent enlistment and fraudulent receipt of pay.

I.

THE ENLISTMENT OF THE APPELLEE IN THE MARINE CORPS OF THE UNITED STATES WAS AN ENLISTMENT "TO SERVE IN THE NAVY," AND WAS THEREFORE VALID.

In the case of *In re* Morrissey, 137 U. S., 157, the Supreme Court said, at page 159:

"The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature;" citing—

U. S. *vs.* Bainbridge, 1 Mason, 71.
Wassum *vs.* Feeney, 121 Mass., 93, 95.

In the case of U. S. *vs.* Bainbridge, *supra*, Mr. Justice Story said:

"It cannot be doubted that the power to enlist minors into the naval service is included within the powers delegated to Congress by the Constitution; and the exercise of the power is justified by the soundest principles of national policy. And if this exercise should sometimes trench upon supposed private rights or private convenience, it is to be classed among the sacrifices which the very order of society exacts from its members in furtherance of the public welfare" (p. 80).

In the case of Wassum *vs.* Feeney, *supra*, it is said through Gray, C. J.:

"The age at which persons shall be deemed competent to do any acts or perform any duties depends wholly upon the legislature."

Section 1418, Revised Statutes of the United States, provides that—

"Boys between the age of 16 and 18 years may be enlisted to serve in the navy until they shall arrive at the age of 21 years; other persons may be enlisted to serve for a period not exceeding five years" (changed to four years by act March 3, 1899, 30 Stat., 1008) "unless sooner discharged by direction of the President."

Section 1419, Revised Statutes of the United States, reads:

"Minors between the age of 14 and 18 years shall not be enlisted for the naval service without the consent of their parents or guardians."

These sections were taken from section 1 of the act of March 2, 1837 (5 Stat., 153), entitled "An act to provide for the enlistment of boys for the naval service, and to extend the term of enlistment of seamen," which is as follows:

"That it shall be lawful to enlist boys for the navy, with the consent of their parents or guardian, not being under 13, nor over 18 years of age, to serve until they shall arrive at the age of 21 years; and it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by direction of the President of the United States."

Construing "other persons" as used in this statute, it is held that minors over 18 years of age may enlist in the naval service without the consent of the parents or guardians.

Gormley's case, 12 Op. A. G., 258, 265, per Stanberry, Attorney General.
(This was the case of a marine.)

Section 289, paragraph 2, of the Regulations for the Government of the Navy of the United States, of 1900, reads:

"Minors over the age of 18 may be enlisted without the consent of parents or guardian."

The same construction has been placed upon the second section of the act of February 13, 1862 (12 Stat., 339), which provides—

"That hereafter no person under the age of 18 shall be mustered into the United States service."

In re Riley, 1 Ben., 408.
In re Beswick, 25 How. Pr., 149, 152.
In re Gregg, 15 Wis., 479.
In re Higgins, 16 Wis., 351.

From the following examination of the statutes we think it is quite clear that the Marine Corps is a part of the Navy of the United States, in so far, at least, that a person enlisted in the Marine Corps is enlisted "for the navy" or "to serve in the navy."

In the revision of the statutes of the United States those relating to the Marine Corps were incorporated into chapter 9 of title XV, The Navy.

The first statute, after the adoption of the Constitution, in which mention is made of marines, is the act of March 27, 1794 (1 Stat., 350), entitled "An act to provide a *naval armament*," the preamble of which reads:

"Whereas the depredations committed by the Algerine corsairs on the commerce of the United States render it necessary that a *naval force* should be provided for its protection:

"SEC. 1. *Be it enacted*, That the President of the United States be authorized to provide * * * equip and employ four ships to carry 44 guns each, and two ships to carry 36 guns each.

"SEC. 2. That there shall be employed on board each of said ships * * * *one lieutenant of marine.* * * *

"SEC. 4. That *the crews of each of said ships* of 44 guns *shall consist of* * * * *50 marines;* and that *the crews of each of said ships of 36 guns shall consist of* * * * *40 marines.*

"SEC. 7. That the pay to be allowed and paid officers, midshipmen, seamen, ordinary *seamen, and marines* shall be fixed by the President of the United States."

This act was conditioned upon the provision that if peace should take place, no further proceeding should be had.

The next statute was that of July 1, 1797 (1 Stat., 523), entitled "An act providing a *naval armament.*"

By section 1 the President was empowered to cause the frigates *United States, Constitution,* and *Constellation* to be manned and employed.

Section 2 provided for the employment on each ship of *lieutenants of marines.*

Section 4 provided that the crews of each ship should consist of, among others, *50 marines* on a ship of 44 guns and *40 marines* on a ship of 36 guns.

Section 5 fixed the pay of the officers, while section 6 provided that the pay to be allowed officers, midshipmen, seamen and *marines* should be fixed by the President.

Section 8 provided "that the officers, non-commissioned officers, seamen and *marines belonging to the Navy* of the United States shall be governed by the rules for the regulation of the navy" theretofore established.

SEC. 10. "That the *seamen and marines* shall not be engaged to serve on board the frigates for a period exceeding one year."

SEC. 11. "That if any officers, * * * *marine or seaman belonging to the Navy* of the United States" should be wounded while in the line of duty, he should be placed on the pension list.

Section 12 provided for the employment of marines on the revenue cutters.

The act of April 27, 1798 (1 Stat., 552), "to provide an additional armament," authorized the President to acquire a number of vessels, not exceeding twelve.

Section 2 provided that the number and grade of the officers to be appointed for the service of said vessels "shall be fixed by the President of the United States, as well as the number of men of whom the respective crews shall be com-

posed, who, as well officers as *seamen and marines*," should receive the same pay, etc., as established by the act of July 1, 1797, and contained a proviso authorizing the President "to cause the term of enlistment of *the seamen and marines* to be employed in any vessel of the United States" to be extended beyond one year if the vessel should be at sea at the expiration of the enlistment.

On July 11, 1798, Congress passed "An act for establishing and organizing a Marine Corps" (1 Stat., 594):

SEC. 1. "That in addition to the present military establishment there shall be raised and organized a corps of marines which shall consist of one major * * * and 720 privates, including the marines who have enlisted or are authorized to be raised for the naval armament; and the said corps may be formed into as many detachments as the President shall direct." * * *

Section 3 provides "that the detachments of the corps of marines hereby authorized shall be made in lieu of the respective quotas of marines which have been established or authorized for the frigates * * * or shall be employed in the service of the United States."

SEC. 4. "That the officers * * * privates and musicians aforesaid shall take the same oath and shall be governed by the same rules and regulations of war as are prescribed for the military establishment of the United States, and the rules for the regulation of the navy heretofore or which shall be established by law, according to the nature of the service in which they shall be employed, and shall be entitled to the same allowance in case of wounds or disability according to their respective ranks as are granted by the act to 'ascertain and fix the military establishment of the United States.'

SEC. 5. "That the non-commissioned officers, *seamen and marines* enlisted into the service of the United States; and the non-commissioned officers and musicians enlisted into the Army of the United States shall be exempted during their term of service" from arrest for debt.

On March 2, 1799 (1 Stat., 732), in the act making appropriations for the support of the naval establishment for the year 1799, Congress appropriated for the support of the Marine Corps.

The following acts were passed for the augmentation of the Marine Corps: Act March 2, 1799 (1 Stat., 729); March 3, 1809 (2 Stat., 544); April 16, 1814 (3 Stat., 124).

By the act of April 18, 1814 (3 Stat., 136), entitled "An act concerning the pay of the officers, *seamen and marines in the Navy* of the United States," it is provided that the pay and bounty upon enlistment of the seamen and marines shall be fixed by the President.

The act of March 3, 1817 (3 Stat., 376), fixed the peace establishment of the Marine Corps.

By section 2 of the act of June 30, 1834, entitled "An act for the better organization of the United States Marine Corps" (4 Stat., 712), it is provided—

"That the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the government of the navy, except when detached for service with the army by order of the President of the United States."

This section has become section 1621, Revised Statutes of the United States.

By section 2 of the act of March 2, 1837 (5 Stat., 153), the first section of which has become sections 1418 and 1419, Revised Statutes of the United States, it is provided—

"That when the term of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service it shall be the duty of the commanding officer of the fleet * * * to send him to the United States * * * unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall serve shall return to the United States."

By section 9 of the naval appropriation act of March 3, 1845 (9 Stat., 790) it is provided that the term "persons" as used in the above section shall be construed to include marines.

This act was passed a few days before the beginning of the trial of the case of Wilkes *vs.* Dinsman (7 How., 125), in the circuit court of the District of Columbia, which case will be discussed hereafter.

Act of March 2, 1847 (9 Stat., 154), provided for an increase of the Marine Corps of the United States, to be reduced at the close of the war with Mexico.

By act of March 3, 1855 (10 Stat., 701), it is provided—

"That each of the surviving officers, musicians and privates, whether of regulars, volunteers, rangers or militia who were regularly enlisted into the service of the United States, and every officer, *seaman, flotilla man, marine, clerk and landsman in the navy,* in any of the wars in which this country has been engaged since 1790" * * * shall be entitled to receive a certificate or warrant from the Department of the Interior for 160 acres of land.

By section 3 of the act of June 12, 1858 (11 Stat., 314, 318), entitled "An act making appropriations for the *naval service* for the year ending" June 30, 1859, it is provided—

"That it shall be lawful to enlist boys for service in the United States Marine Corps, with the consent of their parents or guardians, not being under 11 nor over 17 years of age, to serve until they shall arrive at the age of 21 years; the boys so enlisted to receive the same pay, rations, clothing, etc., now received by boys enlisted in said corps under the authority of the Secretary of the Navy."

By the act of July 25, 1861 (12 Stat., 275), for the better organization of the Marine Corps, it is provided—

"That the appointment of commissioned officers to be made under the provisions of this act shall be of persons between the ages of 20 and 25 years, and they shall be subjected, under the direction of the *Secretary of the Navy*, to an

examination of their qualifications for the service to which they shall be appointed."

Section 9 of the act of July 16, 1862 (12 Stat., 584), entitled "An act to establish and equalize the grade of line officers of the *United States Navy*, provides—

"That any line officer of the *navy or marine corps* may be advanced one grade if, upon recommendation of the President by name, he receives the thanks of Congress for distinguished conduct," etc.

Section 1 of the act of April 6, 1866 (14 Stat., 14), entitled "An act to amend an act entitled An act for the relief of the seamen and others borne on the books of vessels wrecked or lost in the naval service," reads:

"That in case any officer of the navy or marine corps on board the vessel in the employ of the United States which has been sunk or destroyed * * * shall thereby have lost his personal effects, the proper accounting officers are hereby authorized with the approval of the Secretary of the Navy to allow such officer a sum not exceeding the amount of his sea pay for one month." * * *

Section 1 of the act of March 2, 1867 (14 Stat., 515), entitled "An act to amend certain *acts in relation to the navy*," provides that officers of the volunteer *naval service* "transferred to the regular navy or marine corps" shall be credited with the sea service performed as volunteer officers.

Section 6 provides that disabled persons who have served as enlisted persons in the navy or marine corps for twenty years shall receive from the *naval pension fund* half their ratings when discharged.

Section 7 provides that the commandant of the Marine Corps shall have the rank and pay of a brigadier general of the army.

Appropriation Acts.

The first appropriation for the support of the Marine Corps was made in the act of March 2, 1799 (1 Stat., 732), entitled "An act making appropriations for the support of the *naval establishment* for the year 1799."

It is significant in the present connection that from that day to this the Marine Corps has been appropriated for in the naval appropriation acts, or in deficiency or other acts under the head of The Navy.

A few of these acts which have been examined by counsel are here referred to.

Act May 10, 1800 (2 Stat., 79), "making *appropriations for the Navy* of the United States during the year 1800," reads:

"That for defraying the expenses of the Navy of the United States * * * For the pay of the officers * * * of the Marine Corps."

By section 2 of the act of March 3, 1809 (2 Stat., 545), "making appropriations for the support of the military establishment and of the *Navy of the United States* for the year 1809," it is provided—

"That for defraying the expenses of the *Navy* of the United States during the year 1809 the following sums * * * are * * * appropriated: * * * For pay and subsistence of the *Marine Corps.*"

By the "act making appropriations for the *naval service* for the year 1832," approved February 24, 1832 (4 Stat., 498), it is provided—

"That the following sums be and they are hereby appropriated for the *naval service* for the year 1832 * * *

"For the pay of the officers * * * of the *Marine Corps.*"

The same provision was made in the acts appropriating for the naval service for the years 1834 and 1835 (4 Stat., 670, 750); for 1845 and 1846 (9 Stat., 790; 97, 100).

The "act making appropriations for the payment of *navy pensions*" of August 10, 1846 (9 Stat., 101), appropriated for the pay of pensions "of widows of officers, *of seamen and marines.*"

The naval appropriation act of March 3, 1849 (9 Stat., 374), after appropriating for the support of the Marine Corps, provided, page 377:

"That the President of the United States may substitute *marines for landsmen in the navy* so far as he may deem it expedient to procure the efficiency of the service."

In the following naval appropriation acts appropriations were made for the support of the Marine Corps in practically the same language as that used in the act of February 24, 1832 (4 Stat., 498), *supra*, page —:

August 31, 1852, 10 Stat., 100, 103.
March 3, 1853, *ib.*, 220, 223.
August 5, 1854, *ib.*, 583, 586.
March 3, 1855, *ib.*, 675, 679.
August 16, 1856, 11 Stat., 44, 45.
March 3, 1857, *ib.*, 243, 244.
June 12, 1858, *ib.*, 314, 315.
March 3, 1859, *ib.*, 404.
June 20, 1860, 12 Stat., 80, 81.
February 21, 1861, *ib.*, 147.
July 18, 1861, *ib.*, 265, 266.
July 14, 1862, *ib.*, 561, 562.
March 3, 1863, *ib.*, 814, 816.
May 21, 1864, 13 Stat., 80, 82.
March 2, 1865, *ib.*, 462.
April 17, 1866, 14 Stat., 33, 34.
March 2, 1867, *ib.*, 489, 491.
July 17, 1868, 15 Stat., 68, 71.

March 1, 1869, *ib.*, 276, 279.
July 15, 1870, 16 Stat., 321, 323.
March 3, 1871, 16 Stat., 526, 534.
May 18, 1872, 17 Stat., 122, 130, deficiency appropriation act for 1872, under head of "*Navy Department. Naval service. Marine Corps.*"
May 23, 1872, 17 Stat., 145.
March 3, 1873, *ib.*, 547, 555.
June 6, 1874, 18 Stat., 53, 58.
January 18, 1875, *ib.*, 296, 301.
March 3, 1893, 27 Stat., 715.
July 26, 1894, 28 Stat., 123.
March 2, 1895, *ib.*, 825.
June 10, 1896, 29 Stat., 361.
March 3, 1897, *ib.*, 648.
May 4, 1898, 30 Stat., 369.
March 3, 1899, *ib.*, 1024.
March 3, 1901, 31 Stat., 1107.
July 1, 1902, 32 Stat., 662, 686.
March 3, 1903, *ib.*, 1177, 1199.

By the act of July 8, 1880 (21 Stat., 164; 1 Supp., 290), the President is authorized to appoint "from the officers of the navy or the Marine Corps a Judge Advocate General of the Navy."

This act is amended in slight particulars by the act of June 5, 1896 (29 Stat., 251; 2 Supp., 500).

The present incumbent of that office is a captain in the Marine Corps.

The officers in the Marine Corps are appointed from the graduates of the Naval Academy.

Act March 3, 1893, 27 Stat., 715; 2 Supp., 130.
Act March 3, 1899, 30 Stat., 1004; 2 Supp., 969, section 19 of which provides:

"That the vacancies existing in said corps after the promotions and appointments herein provided for shall be

filled by the President, from time to time, whenever the actual needs of the *naval service* require it:

"First. From the graduates of the *Naval Academy*."

The act of January 25, 1895 (28 Stat., 639; 2 Supp., 368), amended March 3, 1901 (31 Stat., 1086; 2 Supp., 1539), authorizes certain officers of the navy or Marine Corps to administer oaths "for the purposes of the administration of *naval justice*, and for other purposes of *naval administration*."

The act of March 3, 1901 (31 Stat., 1099; 2 Supp., 1546), provides:

"That any enlisted man of the *navy or Marine Corps* who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession shall, upon recommendation of his commanding officer, *approved by the flag officer and Secretary of the Navy*, receive a gratuity and medal of honor as provided for seamen in sec. 1407 R. S. U. S."

From this examination of the statutes passed by Congress upon the subject we think it is plain that the appellee Harris was enlisted to "serve in the navy."

Indeed, the oath of enlistment reads:

"I, Harry Fred Harris * * * do hereby acknowledge to have voluntarily enlisted this 27th day of July, 1903, as a private in the United States Marine Corps, *U. S. Navy*, for the period of four years" (R., 6).

In the case of Wilkes *vs.* Dinsman, 7 How., 88, Dinsman, who had enlisted in the Marine Corps and served on board one of the vessels employed in the exploring expedition under the command of Wilkes, brought suit in trespass, alleging that defendant caused him to be whipped and imprisoned. Dinsman's term of enlistment expired while his ship was on foreign service, and he was detained by defendant on the ground that his detention was essential to the public service, under the 2d section of the act of

March 2, 1837 (5 Stat., 153, *supra*). The whipping and imprisonment took place after Dinsman's original term expired and upon his refusal to obey orders. The Supreme Court held that the expression "any person enlisted for the navy," as used in said act of March 2, 1837, included marines. The court said, through Woodbury, J., at page 124:

"Though marines are not, in some senses, 'seamen,' and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines,' indicates the place and nature of their duties generally. And, besides the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part 'of the crews of each of said ships (act 27th March, 1794, 1 Stat., 350, sec. 4). Their pay was also to be fixed in the same way as that of the seamen (sec. 6, p. 351).

"So it was again by the act of April 27, 1798 (1 Stat., 552). And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. (See act of Congress 11th July, 1798, 1 Stat., 595, 596.)

"Thus paid, thus serving, and thus governed like and with the navy, it is certainly no forced construction to consider them as embraced in the spirit of the act of 1837, by the description of persons 'enlisted for the navy.'"

In the case of United States *vs.* Dunn, 120 U. S., 249, the Supreme Court held that service by an officer of the navy as an enlisted man in the Marine Corps was to be credited to him in calculating his longevity pay under the act of March 3, 1883, 22 Stat., 472, 473. The Supreme Court considers the nature of the Marine Corps, and says, on page 253:

"We are of opinion that, taking all these statutes and the practice of the Government together, they are a military body, *primarily belonging to the navy*, and under the control

of the head of the naval department, with liability to be ordered to service in connection with the army, and in that case under the command of army officers." * * *

Page 255:

"And while it may be true that it is not so exclusively a part of the navy as ships and navy yards are, yet its general supervision and control remain with the Navy Department."

In the case of Com. *vs.* Gamble, 11 S. & R., 92, one Ward, a minor, enlisted in the Marine Corps, sought his discharge on *habeas corpus.* The writ was denied, the court saying, through Gibson, justice:

"The truth is, this corps has no necessary connection with the army; it is a part of the naval establishment; and it is exclusively subject to the orders of the Secretary of the Navy."

In Com. *vs.* Fox, 7 Pa. St., at 339, it is said that the case in 11 Serg. & Rawle, 93, was "an enlistment into the naval service."

The case of *In re* Doyle, 18 Fed., 369, decided by Judge Brown, of the southern district of New York, is exactly like the case at bar. There Doyle had enlisted in the Marine Corps at the age of 19, without the consent of his parents, and his father sought to secure his release upon writ of *habeas corpus.* After discussing the statutes, Judge Brown held that the Marine Corps was a part of the navy. He said, on page 370:

"Notwithstanding this intermediate character of the Marine Corps, and these several provisions allying it in several respects with the military service, I am satisfied that *it is properly classed with, and is a part of, the naval service of the United States.* * * *

"In various acts of Congress making appropriations, the marines are frequently referred to as a part of the naval service, and are sometimes described as '*marines of the United States Navy.*'"

The writ was dismissed, and Doyle was remanded.

We respectfully submit that, under the statutes and the authorities, the enlistment of the appellee Harris into the marine corps was valid under section 1418, Revised Statutes of the United States.

II.

THE ENLISTMENT OF THE APPELLEE IN THE MARINE CORPS WAS NOT AN ENLISTMENT INTO THE MILITARY SERVICE OF THE UNITED STATES.

The court below held that the enlistment of the appellee in the Marine Corps was an enlistment into the "military service" of the United States, and was therefore void under section 1117, Revised Statutes of the United States, which is as follows:

"No person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parent or guardians; provided that such minor has such parent or guardians entitled to his custody and control."

Even should the court be of the opinion that the enlistment of appellee in the Marine Corps was not an enlistment in the navy and not governed by section 1418, Revised Statutes of the United States, yet we think it is clear, and expect to show from an examination of the statutes, that it was not an enlistment in the military service of the United States as that expression is used in section 1117, and that that section is inapplicable. If the enlistment, therefore, is governed by neither section 1117 nor section 1418, we must fall back on the common law.

At common law, irrespective of any statute, the enlistment of the appellee would be valid. This is settled in the Morrissey case, 137 U. S., 159, where it is said:

"An enlistment is not a contract only, but effects a change of status. Grimley's case, *ante* 147. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. The King *vs.* Rotherford Greys, 2 Dow. & Ryl., 628, 634; 1 B. & C., 345, 350; King *vs.* Lytchet Matravers, 1 Man. & Ryl., 25, 31, 7 B. & C., 226, 231; Com. *vs.* Gamble 11 S. & R., 93; U. S. *vs.* Blakeney, 3 Gratt., 405, 411–413."

The common law is in force in the District of Columbia.
De Forrest *vs.* U. S., 11 App. Cas. D. C., 458, 465.
Tyner *vs.* U. S., decided by this court April 5, 1904, pp. 17 *et seq.*
Code D. C., sections 1, 1640.

Unless, then, the enlistment of appellee was an enlistment into the "military service" within the meaning of section 1117 of the Revised Statutes, it is valid either under section 1418 of the Revised Statutes or under the common law.

Military is derived from *miles*, a soldier.

"Military is a general word for land forces" (Standard Dictionary, title Army, synonyms).

"The military resources of a country include both army and navy, and the phrase military office has been legally construed to apply to both; but in ordinary language military is used only in relation to the land forces as distinguished from the naval or sea forces" (Century Directory, title Military).

We think from the following examination of the statutes that the word military has been used by Congress with its ordinary meaning, and that it has throughout the statutes the meaning of the army or the land forces as distinguished from the naval forces, and never as including the Marine Corps.

On September 29, 1789 (1 Stat., 95), was passed "An act to recognize and adapt to the Constitution of the United

States the establishment of the troops raised under the resolves of the United States in Congress assembled, and for other purposes therein mentioned." No reference is made therein to marines or the Marine Corps.

The act of April 30, 1790 (1 Stat., 119), "For regulating the *military establishment* of the United States," repealed the above act, and provided for the number of troops, officers, etc., in the army.

On March 3, 1791 (1 Stat., 222), was passed "An act for raising and *adding another regiment to the military establishment* of the United States, and for making further provision for the protection of the frontiers."

Section 3 of the act of March 5, 1792 (*Ib.*, 241), entitled "An act for making further and more effectual provision for the protection of the frontiers of the United States," refers to the act of 1790 for regulating the military establishment.

Section 7 provides for the monthly pay of the officers, privates, and musicians "*on the military establishment* of the United States."

The act of January 2, 1795 (1 Stat., 408), entitled an "Act to regulate the pay of the non-commissioned officers, musicians and privates of the militia of the United States when called into actual service, and for other purposes," provides:

SEC. 5. "That for the completing and better support of the *military establishment* of the United States as provided by the act entitled 'An act making further and more effectual provision for the protection of the frontiers of the United States,' there shall be allowed and paid from and after the first day of January, 1795, to each of the non-commissioned officers, musicians and privates now in the service," etc.

SEC. 6. "That to those in the *military service* of the United States who are or shall be employed on the western frontiers there shall be allowed during the time of their being so employed," additional rations.

The act of March 3, 1795 (1 Stat., 430), entitled "An act for continuing and regulating the *military establishment* of the United States, and for repealing sundry acts heretofore passed on that subject," provides:

SEC. 1. "That the present *military establishment* of the United States, composed of a corps of artillerists and engineers to consist of 992 non-commissioned officers, privates and musicians, and of a legion to consist of 4,800 non-commissioned officers, privates and musicians, be and the same is hereby continued."

SEC. 10. "That the monthly pay of the officers, musicians and privates *on the military establishment* of the United States be as follows," etc.

The act of May 30, 1796 (1 Stat., 483), entitled "An act *to ascertain and fix the military establishment* of the United States," provides:

SEC. 1. "That the *military establishment* of the United States from and after the last day of October next be composed of the corps of artillerists and engineers as established by the act entitled 'An act providing for raising and organizing a corps of artillerists and engineers.'"

SEC. 12. "That the monthly pay of the officers, musicians and privates *of the military establishment* be as follows:"

* * *

SEC. 22. "That so much of any act or acts now in force as comes within the purview of this act shall be and the same is hereby repealed; saving, nevertheless, such parts thereof as relate to the enlistments or term of the service of any of the troops which by this act are continued *on the present military establishment* of the United States."

Section 1 of the act of May 28, 1798 (1 Stat., 558), entitled "An act authorizing the President of the United States to raise a provisional army," provides that the President, in case of war, shall have power to enlist not exceeding 10,000 troops.

SEC. 2. "That the President be authorized to organize with a suitable number of major generals and conformably

to the *military establishment* of the United States the said troops into corps of *artillery, cavalry and infantry.*"

"An act making appropriations for the *military establishment* for the year 1798, and for other purposes," approved June 12, 1798 (1 Stat., 563), appropriates for the support of the military establishment for the year 1798, etc.

"An act for better organizing of the troops of the United States, and for other purposes," approved March 3, 1799 (1 Stat., 749).

"SEC. 8. That in the ordinary arrangement of the army two regiments of infantry or cavalry shall constitute a brigade commanded by a brigadier general, two brigades a division, and shall be commanded by a major general; provided * * * that this act shall not render it necessary to appoint any greater number of general officers than have been heretofore authorized by law sooner than in the opinion of the President the *military service* of the United States shall require it."

There is not the slightest reference in any of these statutes to marines or to the Marine Corps.

"An act making appropriations for the *military establishment* in the year 1800," approved May 10, 1800 (2 Stat., 66), appropriates for the support of the army.

"An act making appropriations for the support of the *military establishment* and of the *navy* for the year 1809," approved March 3, 1809 (2 Stat., 545), provides:

"SEC. 1. That for defraying the expenses of the *military establishment* of the United States * * *

"SEC. 2. That for defraying the expenses of the *Navy* of the United States the following sums be and they are appropriated * * * For pay and subsistence of officers of *the Marine Corps.*"

The following acts "making appropriations for the support of the *military establishment* for the year," etc., do not appropriate for the Marine Corps: March 3, 1815 (3 Stat., 222); April 29, 1816 (*ib.*, 330); March 3, 1817 (*ib.*, 359).

"An act to increase the present *military establishment* of the United States," approved July 29, 1861 (12 Stat., 279), deals only with the army.

"An act to provide for the *efficiency of the navy*," approved July 1, 1864 (13 Stat., 342), provides:

"That any person enlisted in the military service of the United States who shall apply to the Navy Department to be transferred to the navy or Marine Corps shall, if his application be approved by the President of the United States, be transferred to the navy or Marine Corps to serve out the residue of his enlistment therein, subject to the laws and regulations for the government of the navy."

SEC. 2. "That any seaman or mariner drafted into the military service may by order of the President be transferred to the naval service, to serve therein subject to the laws and regulations of the navy."

SEC. 3. "That all enlistments into the naval service or Marine Corps during the present war shall be credited to the appropriate township," etc.

SEC. 4. "That all persons hereafter enlisted into the naval service or Marine Corps shall be entitled to receive the same bounty as if enlisted in the army."

Section 1 of this act has become section 1421, Revised Statutes of the United States, which reads:

"*Any person enlisted in the military service* of the United States *may*, on application to the Navy Department, approved by the President, *be transferred to the navy or Marine Corps*, to serve therein the residue of his term of enlistment, subject to the laws and regulations for the government of the navy. But such transfer shall not release him from any indebtedness to the Government, nor, without the consent of the President, from any penalty incurred for a breach of military law."

The act of July 1, 1864, was preceded by a resolution of February 24, 1864 (13 Stat., 402), relative to the transfer of persons in the military service to the naval service:

* * * "That the President of the United States may, whenever in his judgment the public service requires, au-

thorize and direct the transfer of persons who have been employed in sea service and are now enlisted in regiments for land service, from such regiments to the naval service upon such terms and according to such rules and regulations as he may prescribe."

This resolution was repealed on June 3, 1864 (13 Stat., 119).

"An act for enrolling and calling out the national forces and for other purposes," approved March 3, 1863 (12 Stat., 731):

SEC. 1. "That all able-bodied male citizens of the United States, etc., between the ages of 20 and 45 years of age * * * are hereby declared to constitute the national forces, and shall be liable to *military duty* in the service of the United States when called out by the President for that purpose."

The act contains 38 sections, and the expressions *military duty* and *military service* are used frequently and always as meaning service in the army.

The above act is amended by the act of February 19, 1864 (13 Stat., 6).

SEC. 1. "That the President of the United States shall be authorized whenever he shall deem it necessary during the present war to call for such number of men for the *military service* of the United States as the public exigencies may require."

This act contains 27 sections, and it is apparent that the expression *military service*, frequently used therein, is always used as synonymous with service in the army.

Section 7 provides that any mariner or seaman drafted under this act may have the right to enlist in the naval service.

Section 10 exempts from draft all persons actually in the military or naval service of the United States.

"An act to further regulate and provide for the enrolling and calling out of the national forces, and for other purposes," approved July 4, 1864 (13 Stat., 379), contains 11 sections, and uses the expression *military service* with the same meaning.

"An act to amend the several acts heretofore passed to provide for the enrolling and calling out of the national forces," approved March 3, 1865 (13 Stat., 487), contains 27 sections, in which the expression *military service* occurs frequently and with the same meaning.

"An *act to increase and fix the military peace establishment* of the United States," approved July 28, 1866 (14 Stat., 332), provides:

SEC. 1. "*That the military peace establishment of the United States shall hereafter consist of five regiments of artillery, ten regiments of cavalry, and forty-five regiments of infantry, the professors and corps of cadets of the United States Military Academy, and such other forces as shall be provided for by this act,* TO BE KNOWN AS THE ARMY OF THE UNITED STATES."

The act contains 38 sections, but no reference is made to the Marine Corps, and it is not therefore included in the *military establishment.*

"An act making appropriations for the support of the army for the year 1871," approved July 15, 1870 (16 Stat., 315, 320):

"That every private soldier who has served in the Army of the United States during the rebellion for ninety days and remained loyal to the Government, and every seaman, marine and officer or other person who has served in the Navy of the United States or in the Marine Corps or revenue marine during the rebellion for ninety days and remained loyal to the Government," shall be entitled to one quarter section of land, etc.

The deficiency appropriation act for the year 1872 approved May 18, 1872 (17 Stat., 122, 127), under the head of "War Department, military establishment," appropriates "For the pay department, for the allowance to the officers of the army for transportation of themselves," etc.

"An act to revise, consolidate and amend the laws relating to pensions," approved March 3, 1873 (17 Stat., 566), provides:

SEC. 1. "That if the ability of any officer of the army, including regulars, volunteers and militia, or any officer of the navy or Marine Corps, or any enlisted man, however *employed in the military or naval service of the United States, or in its Marine Corps* * * * disabled by reason of any wound * * * received * * * while in the service of the United States and in the line of duty * * * he shall, upon making proof of the fact * * * be placed upon the list of invalid pensioners of the United States."

Section 1117 of the Revised Statutes of the United States is taken from the first section of the act of May 15, 1872 (17 Stat., 117), entitled "An act to provide that minors shall not be enlisted in the military service of the United States without the consent of parents or guardians."

On the same day two other acts were approved, one "To establish the pay of the enlisted men of the army" (17 Stat., 117), and the other "To establish a system of deposits and to prevent desertion and to elevate the rank and file of the army" (*Ib.*, 117).

In the Revised Statutes this section from the act of 1872 is put under the title of the army.

Section 1094, Revised Statutes of the United States, enumerates the constituent parts of the army, but contains no reference to the Marine Corps.

Section 1228, Revised Statutes, provides: "No officer of the army who has been or may be dismissed from the service by the sentence of a general court-martial * * * shall ever be restored to the *military service* except by a reappointment confirmed by the Senate."

Section 1229, Revised Statutes: "No officer in the *military or naval service* shall in time of peace be dismissed from the service except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof."

We respectfully submit that, even should the court be of the opinion that the appellee Harris was not enlisted in the navy, and that his enlistment is not governed by section 1418 of the Revised Statutes of the United States, yet it is plain that the enlistment of Harris was not into the "military service" of the United States, and therefore it is valid under the common law.

Such is the decision of Gibson, J., in Com. *vs.* Gamble, 11 S. & R., 92, cited with approval in the Morrissey Case, 137 U. S., 159, and hereinbefore quoted from, where he says:

"The single question to be decided is, whether the enlistment of a minor into the corps of marines is void by any act of Congress or at the common law. The act which regulates enlistments in the army, prohibits the enlistment of minors, except as musicians; and on the other hand, the act which regulates the enlistment of seamen expressly authorizes the enlistment of minors; and hence, a question, whether this corps is a part of the army or a part of the navy. It may be ordered to the land service; but so may the whole of the seamen in service, if it be the will of the Government so to employ them. The officers of this corps serve indiscriminately on courts-martial with officers of the army; but so they do with officers of the navy; all this, therefore, proves nothing. *The truth is, this corps has no necessary connection with the army; it is a part of the naval establishment and is exclusively subject to the orders of the Secretary of the Navy.* The prohibition of the act of Congress, on the subject of recruiting the army, therefore, being out of the question, it is unnecessary to inquire whether the case of the person whose liberation is claimed, falls within the act which authorizes the enlistment of minors as seamen; as I am well satisfied the enlistment is good, independently of the enabling provisions of any statute.

"At common law, the contract of an infant will bind him, where it is beneficial; and I am far from being convinced, that the contract of enlistment is not, in contemplation of law, of that kind. But I put the case on broader ground—the ground of public policy; which requires that a minor be at liberty to enter into a contract to serve the State, whenever such contract is not positively forbidden by the State

itself; during the existence of which service parental authority over him is suspended, though not annihilated. This is the common law of England; and there is nothing in the Constitution of the Government, or of the circumstances of the people of this country, to afford a reason why it should not be the common law here. In a state of war, the necessity of such a principle is obvious; and the same necessity exists, although in a less degree, in a state of peace."

III.

WHETHER THE ENLISTMENT OF APPELLEE BE VOIDABLE OR NOT, HE SHOULD NOT BE DISCHARGED UNTIL HE HAS ANSWERED THE NAVAL CHARGE ON WHICH HE WAS HELD.

The return shows that the appellee Harris was held on a charge of fraudulent enlistment and fraudulent receipt of pay and allowances, and had been committed to the guard-house to await action on that charge.

The charge was made under the act of March 3, 1893, making appropriations for the naval service (27 Stat., 715; 2 Supp., 130), which provides:

"And fraudulent enlistment and the receipt of pay or allowances thereunder is hereby declared an offense against naval discipline and made punishable by general court-martial under article 22 of the articles for the government of the navy."

"A minor who enlists is not only *de facto* but *de jure* a soldier, and amenable to military jurisdiction."

In re Miller, 114 Fed., 838, citing—

In re Morrissey, 137 U. S., 159.

The appellee Harris was, therefore, *de facto* and *de jure* a marine, and it appearing to the court in the return that he was charged with a naval offense, the writ of *habeas corpus* should be discharged until the naval authorities have acted upon the naval charge.

In the matter of Miller, 114 Fed., 838, Miller, a minor, had enlisted in the army without the consent of his parents, had deserted, been apprehended, and was held on charges of fraudulent enlistment and desertion when his parents sued out a writ of *habeas corpus*. The decision of the district court discharging Miller was reversed by the circuit court of appeals for the fifth circuit, the court saying, at page 843:

"When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, a civil court will not interfere on *habeas corpus* when such military authorities have jurisdiction; and if a minor over the age of 16 years enlisted in the service is so charged and detained, a civil court will not, either on his own application or that of his parents or guardian, discharge him until he has been released from the prosecution pending against him."

See Com. *v.* Gamble, 11 S. & R., 93.

We respectfully submit that the order of the court below discharging the appellee is erroneous and must be reversed.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.

JESSE C. ADKINS,
Assistant United States Attorney for the District of Columbia.

FILED

FEB 25 1904

Henry W. Hodges
Clerk

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1904.

No. 1400.

No. 19, Special Calendar.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS,
APPELLANTS,

vs.

HARRY F. HARRIS.

Motion to Affirm Judgment or to Dismiss Appeal.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Appellee.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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vs.

HARRY F. HARRIS.

Motion to Affirm Judgment or to Dismiss Appeal.

Now comes the appellee and moves the court to affirm the judgment of the court below, or dismiss the appeal in this cause, and for reasons therefore states:

1. That the record shows that there was an issue of fact in the court below which was tried upon evidence admitted by the appellants, and that no exception or objection was taken to the ruling of the court thereon.

2. The record fails to set out any point of law that was submitted to the court below for its decision, nor does it show that any exception was taken to the ruling of the court on the facts of the case.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Appellee.

To MORGAN H. BEACH, ESQ.,
U. S. District Attorney, and
JESSE ADKINS, ESQ.,
Asst. U. S. District Attorney,
Attorneys for Appellants.

Please take notice that the above motion will be called for hearing in the Court of Appeals on Tuesday, March 1, A. D. 1904, at 10 o'clock a. m. or as soon thereafter as counsel can be heard.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Appellee.

Statement of Case.

This cause was tried at the October term of the Supreme Court of the District of Columbia, and the judgment rendered discharging Harry F. Harris, an infant, who, by his next friend, George F. Harris, filed a petition for the writ of habeas corpus. The record shows that the petition for the writ was issued, and that the appellants produced Harry F. Harris in court, with a return to the writ. Issue was joined on this return, and the case came on for hearing on December 11, 1903, upon the petition for the writ of habeas corpus, the return and the replication thereto and testimony as per stipulation, and all other proceedings, and the court discharged the said Harry F. Harris from the custody of respondents.

It would appear from the record that Harry F. Harris was discharged on all of the proceedings had, and that no exception, objection, or statement was made by counsel for the government to show that they desired to take any exception to the ruling of the court or make any record or bill of exceptions for the purpose of hearing in this court.

Points and Authorities.

It is insisted that the record failing to show that any question of law was decided by the court below, this court can not consider any questions that might now be raised by the appellants. From the state of the record it appears that there was no issue of law involved, but that issue was joined on a question of fact and decided upon the facts of the case, and that no exception was taken on the part of the appellants. There being no bill of exceptions or motion to quash, or demurrer in the record, the record is so imperfect that the only thing this court can do is to affirm the judgment of the court below or dismiss the appeal. This same question arose in this court in the case of Lofton *vs.* Lofton, No. 695, and the court, without delivering any opinion, affirmed the decision of the court below. It arose again in the case of George B. Fleming *vs.* Albert A. Wilson, No. 764, and the court, without delivering any opinion, dismissed the appeal.

Both of these cases were habeas corpus cases, and in both of them the same defect existed that exists in the present case. In other words, there being no exception taken to the ruling of the court, and no bill of exceptions prepared on the evidence, which was admitted without proof, this court can not decide whether or not the court below committed error.

Where there is no bill of exceptions and no demurrer, motion to quash, or motion in arrest of judgment, this court will not ordinarily look into the points in the case.

Otterback *vs.* Patch, 5 App. Cas. 69.
Lyon *vs.* Ford, 7 App. Cas. 317.
McAfee *vs.* Huidekooper, 9 App. Cas. 37.

This court refused to take notice of a point raised for the first time in this court in the case of McAfee *vs.* Huide-

kooper, and again in the Washington Gas Company *vs.* Lansden, 9 App. Cas. 508, the court adhered to this rule.

The case of Mansfield *vs.* Winter was considered by the court as a case where an exception should be made, the question of want of jurisdiction of the court in that case appearing on the record; but, we submit that no such exception should be made in this case, nor can it be said that because the testimony offered to be produced on the part of the petitioner was admitted without producing the oral witnesses affects this question, for in the case of Frizzell *vs.* Murphy, in 19 App. D. C., at page 443, this court, speaking through Mr. Chief Justice Alvey, said:

> "The case is, therefore, not properly before this court for reveiw, for the want of a bill of exceptions certifying to this court what was done and ruled on the trial below, and we should, in strictness, dismiss the appeal or enter judgment below affirmed; for it is very clear that we could not, in justice to the court below, proceed to review and reverse the judgment upon the state of the record as now presented."

In that case the agreed statement of facts set up the fact that the court instructed the jury to render their verdict for the defendant, and that the plaintiff noted an exception, but because there was no exception prepared and none signed by the court, the court held that the case was not properly before them.

In this case, the record fails to show that the court was asked upon the evidence, to decide the care for the appellants or that any exception was taken by the appellants to the decision of the court when Harris was discharged.

Therefore, we submit that there is nothing in the record for the court to decide, and that under the rule of this court the court has not only power to dismiss the appeal, but can affirm the judgment of the court below.

In view of the decision of the Supreme Court of the United States in the case of Tubman *vs.* The Baltimore &

Ohio R. R. Co., 190 U. S. 38, it would appear that the better practice would be to affirm where the court has acquired jurisdiction of the case, but whether or not that case means that this court can not dismiss the appeal where there is nothing in the record for them to decide it is not necessary for us to consider, for whether the appeal be dismissed or the judgment be affirmed the relief granted to the appellee will be the same.

We, therefore, respectfully submit that this court should either affirm the judgment or dismiss the appeal.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Appellee.

Court of Appeals, District of Columbia.

JANUARY TERM, 1904.

No. 1400.

No. 19, Special Calendar.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS, APPELLANTS,

vs.

HARRY F. HARRIS.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS.

MORGAN H. BEACH,

United States Attorney for the District of Columbia.

Court of Appeals, District of Columbia.

JANUARY TERM, 1904.

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No. 19, Special Calendar.

GEORGE F. ELLIOTT AND RANDOLPH DICKINS,
APPELLANTS,

vs.

HARRY F. HARRIS.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM OR DISMISS.

STATEMENT.

On December 9, 1903, one George F. Harris filed a petition in the supreme court of the District of Columbia praying for the writ of *habeas corpus* to secure the release of his son, Harry F. Harris, the appellee, then in the custody of appellants.

Petitioner alleged that he was the father of appellee, who was an infant 19 years of age; that petitioner had never relinquished his claim as such father, and was entitled to the legal care and exclusive custody of appellee; that on July 27, 1903, appellee, without the consent or knowledge of petitioner, enlisted in the Marine Corps of the United States at Washington, D. C.; that said appellee was then in the custody of appellants as commander of the Marine Corps and commandant of the Washington barracks respectively. Petitioner further alleged that he was advised and believed that appellee had no authority to enlist without petitioner's consent; that he had demanded of appellants the release of appellee, and that appellants were illegally and without authority depriving him of the custody of his son (Rec., 1, 2).

In obedience to the writ issued upon this petition, on December 11 the appellants produced the body of the appellee in court and filed their return. In this they alleged that they held appellee, by virtue of the authority of the United States, as a private in the Marine Corps; that appellee was, at Washington, D. C., on July 27, 1903, duly enlisted in the said Marine Corps as a private for the term of four years, and a certified copy of the enlistment papers was attached to the return (Rec., 4, 6, 7).

It was further alleged in the return that on December 9, 1903, appellee was charged by the appellant, Randolph Dickins, with the offense of fraudulent enlistment and fraudulent receipt of pay and allowances, and committed to the guard-house, and was held by appellants on that charge. A copy of a letter from the appellant Dickins to the appellant Elliott, making said charge and recommending the court-martial of appellee, was attached to the return as Exhibit B (Rec., 4, 5).

The petitioner joined issue on this return (Rec., 7).

Upon these pleadings petitioner offered to prove that when appellee enlisted he was under the age of 21 years and had not been emancipated by his father. As will be

noticed, these facts were fully alleged in paragraphs 2 and 3 of the petition, and were not denied in the return. That they were true was therefore admitted by appellants (stipulation, Rec., 8).

Petitioner also offered to prove that the arrest of appellee mentioned in the return did not occur until after the service of the writ of *habeas corpus*. This also was admitted (Rec., 8).

No other evidence was offered or presented (Rec., 8).

There was left, therefore, for consideration by the court the one point made in the petition, that the enlistment of the appellee, a minor, without the consent of his father, was illegal.

After the case had been argued and submitted, the court, on December 22, 1903, decided the case upon the point presented in the petition, holding that the enlistment was void, and ordering the discharge of the appellee. (See the opinion of Mr. Chief Justice Clabaugh appended to this brief.)

The order discharging appellee recites that the cause came on to be heard upon the petition, the writ, the return and replication thereto, and testimony as per stipulation filed and all other proceedings, thus incorporating in the decree the admitted facts (Rec., 8).

From this order an appeal was prosecuted to this court.

The appellee has moved to affirm the judgment of the court below or to dismiss the appeal.

ON THE MOTION TO AFFIRM.

A motion in this court to affirm a judgment of the court below can only be filed in accordance with the terms of section 2 of rule XVI of this court, which provides:

"In order to prevent the abuse of the right of appeal, and to avoid vexatious delays, there may be united with a motion to dismiss the appeal a motion to affirm on the ground that, although the record may show that this court has ju-

risdiction of the case, it is manifest that the appeal was taken for delay *only*, or that the question on which the jurisdiction and right of review depends is so *manifestly frivolous* as not to require further argument; and in all cases of such motions there shall be filed a brief statement of the points or questions decided by the court below, and the ground upon which the motion is made."

The motion to affirm here is not made on the ground that the appeal was taken for delay only, nor on the ground that the question on which the jurisdiction and right of review depends is so manifestly frivolous as not to need further argument, nor is there filed by the appellee any statement of the points or questions decided by the court below nor any discussion of the merits of those questions.

While the motion to affirm must therefore be denied for failure to comply with the rule, we will quote briefly the authority upon which we rely to reverse the judgment of the court below.

It was held by the lower court that, for the reason stated in the petition, to wit, that the enlistment of the appellee, a minor, without the consent of his father was void, his detention was illegal.

In the case of *In re* Morrissey, 137 U. S., 157, 159, it is held by the Supreme Court that—

"The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature (U. S. *v.* Bainbridge, 1 Mason, 71; Wassum *v.* Feeney, 121 Mass., 93, 95). Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties.

"An enlistment is not a contract only, but effects a change of status (Grimley's case, *ante*, 147). It is not, therefore, like an ordinary contract, voidable by the infant. *At common law an enlistment was not voidable either by the infant or by his parents or guardians* (The King *v.* Inhabitants of Rotherford Greys, 2 Dow. & Ryl., 628, 634; 1 B. & C., 345, 350. King *v.* Inhabitants of Lytchet Matravers, 1 Man. & Ryl.,

25; 7 B. & C., 226, 231; Com. *v.* Gamble, 11 S. & R., 93; U. S. *v.* Blakeney, 3 Gratt., 405, 411–413)."

We know of no statute of the United States which prohibits the enlistment of minors in the Marine Corps. The common law being in force in the District of Columbia, this decision of the Supreme Court is controlling, and the judgment appealed from should be reversed.

ON THE MOTION TO DISMISS.

The motion to dismiss is based upon the ground that the case was decided by the court below upon an issue of fact, and that there is no bill of exceptions.

We say, however, that the question involved in this appeal is a naked question of law, which arises upon the face of the petition for the writ of *habeas corpus;* that the petition is wholly insufficient in law to justify the judgment entered; that the insufficiency is apparent on the face of the record, and therefore no bill of exceptions is necessary.

The case comes within the rule laid down in the case of Winter *vs.* Mansfield, 10 App. Cas. D. C., at page 556:

"But this reason of the rule does not apply to the case where the declaration states a case not within the jurisdiction of the court, *or which wholly fails to show any such legal cause of action upon which a valid judgment can be rendered. In such case, the declaration itself presents the question, and the court must be assumed to have taken notice of the case as therein stated, when called upon to render judgment* (Slacum *v.* Pomery, 6 Cr., 221; McAllister *v.* Kuhn, 96 U. S., 87; Cragin *v.* Lovell, 109 U. S., 194; Moline Plow Co. *v.* Webb, 141 U. S., 616, 623)."

In Slacum *vs.* Pomery, 6 Cranch, 221, the declaration was on a foreign bill of exchange. Issue was joined, a trial was had, and there was a verdict and judgment for plaintiff. The Supreme Court, however, reversed the judgment on error, because the declaration failed to allege notice of the

protest, "an omission which is deemed fatally defective" (p. 224, per Marshall, C. J.).

In the following cases this rule was followed, and the cases were reversed for insufficiency in the declaration:

Blacklege *vs.* Benedict, 12 Ind., 389.
Read *vs.* Wheeler, 2 Yerg., 56.
Knott *vs.* Hicks, 2 Hump., 163.

In Gautier *vs.* Franklin, 1 Tex., 738, judgment was reversed where the record showed an erroneous failure of the court below to notice a plea of the statute of limitations.

In Garland *vs.* Davis, 4 How., 131, 143, it is said:

"This court can notice a material and incurable defect in the pleadings and verdict as they are presented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions nor suggested by counsel here."

In Bennett *vs.* Butterworth, 11 How., 669, 676, it is said, through Taney, C. J.:

"The judgment is evidently erroneous and must be reversed. And as these errors are patent upon the record, they are open to revision here without any motion in arrest of judgment or exception taken in the district court."

In Rogers *vs.* Burlington, 3 Wall., 654, 661, it is said:

"It is true that where the error is apparent on the face of the record a bill of exceptions is unnecessary."

In Barth *vs.* Clise, 12 How., 400, 403, it is said:

"The plaintiffs in error, according to their own showing, had not the shadow of a right to recover in this action against Clise. Conceding, for the purpose of this opinion, that the court below erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought

to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect."

In Insurance Co. *vs.* Piaggio, 16 Wall., 378, 386, it is said:

"Whenever the error is apparent in the record the rule is that it is open to re-examination whether it be made to appear by bill of exceptions or in any other manner; and it is everywhere admitted that a writ of error will lie when a party is aggrieved by an error in the *foundation*, proceedings, judgment or execution of a suit in a court of record."

In Railroad Co. *vs.* Trustees 6th Presbyterian Church, 91 U. S., 127, 130, the court say:

"Errors apparent in the record, it is true, are open to revision whether the error be made to appear by bill of exceptions or in any other legal manner."

In McAllister *vs.* Kuhn, 96 U. S., 87, judgment was taken by default. The court said, through Waite, C. J.:

"*Upon a writ of error to reverse a judgment by default, such defects in the declaration or complaint as could have been taken advantage of before judgment by general demurrer may be brought under review.* If the judgment would have been arrested on motion, if made, because the declaration did not state facts sufficient to constitute a cause of action, it may be reversed for the same reason upon error" (p. 89).

This ruling was followed in Cragin *vs.* Lovell, 109 U. S., 194, 199, where it is said, per Gray, J.:

"The judgment having been rendered on default upon a declaration setting forth no cause of action, the judgment should be reversed."

In Clinton *vs.* Mo. Pac. Railway Co., 122 U. S., 469, 474, it is said:

"If the facts on which this decision was made are to be found in what may be properly called the record of the case before the judge when he decided it, as it is here presented

to us, then there was no need of any bill of exceptions in the matter."

In Moline Plow Co. *vs.* Webb, 141 U. S., 616, there was an action to recover on certain notes; to the petition there was a demurrer and answer denying the allegations of the petition and pleading limitations; a supplemental petition was filed, to which there was another answer; jury was waived, and the case was heard by the court, who entered judgment for plaintiff for a part of the sum sued for. Writ of error was sued out to the Supreme Court. There Harlan, J., in delivering the opinion of the court, said:

"Although the record recites that the case was heard upon the pleadings and evidence, it does not appear that any oral testimony was introduced. No bill of exceptions was signed, and the finding of the court was general, stating only its conclusions of law. The defendant therefore contends that there is nothing before this court for review.

"This position cannot be maintained. * * * In refusing judgment for the entire amount of the notes, less the admitted credits, the court below necessarily proceeded on the ground that, independently of any option upon the part of the plaintiff, the notes became absolutely due and collectible at one or the other of the dates just mentioned, and consequently the action on them was barred. If this is error, it is one apparent on the record, and need not have been presented by a bill of exceptions" (622, 623).

In World's Columbian Exposition Co. *vs.* Republic of France, 91 Fed., 64 (C. C. A., 7th circuit), in delivering the opinion of the court, Showalter, J., said:

"It is fundamental that a judgment cannot stand unless the facts of record—*apart from any showing by bill of exceptions*—aided as far as may be by the verdict, will support it. This rule holds equally where no point of the kind was made before the trial judge, either by demurrer or motion in arrest of judgment (Slacum *v.* Pomery, 6 Cranch, 224; United States Bank *v.* Smith, 11 Wheat., 172; Funk *v.* Piper, 50 Ill. App., 163; Pa. Co. *v.* Congdon, 134 Ind., 226;

33 N. E., 795). In entering the judgment the trial judge necessarily rules or assumes that the record itself—*not matters to be presented by bill of exceptions*—contains the showing of fact on which such judgment may be lawfully predicated. If the record be insufficient, then, in strictness, the error occurs in entering the judgment" (page 69).

We respectfully submit that it is apparent from the record here that the petition for the writ of *habeas corpus* is wholly insufficient as a foundation for a judgment discharging the appellee; that no bill of exceptions is necessary to raise the question here, and that therefore the motion to affirm or dismiss must be denied.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.
JESSE C. ADKINS,
Assistant United States Attorney.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

IN THE MATTER OF HARRY F. HARRIS. *Habeas Corpus.* No. —.

WASHINGTON, D. C., *Dec.* 22, 1903,
Tuesday, at 10 o'clock a. m.

Present: Mr. Baker, representing the petitioner; Mr. Adkins, representing the United States.

Opinion of Mr. Chief Justice Clabaugh.

The COURT: In the *habeas corpus* case of Harry F. Harris I feel that I must follow the view taken by this court in general term. Until some higher authority undertakes to change the view already expressed by that court I do not feel like departing from that view.

It appears that this man was nineteen years of age when he enlisted in the Marine Corps. He represented himself as being over twenty-one years of age. The question urged upon the court is, on the one side that the Marine Corps is part of the navy, and therefore enlistments are to be controlled by the laws governing enlistments in the navy. They cite as authority a decision of the supreme court of the State of Pennsylvania in which it was held that a marine is not a part of the army. Our own courts in a similar case have held that the Marine Corps is not a part of the navy.

The Supreme Court of the United States in a case—I have forgotten exactly the number of the volume——

Mr. BAKER: U. S. *v.* Dunn, 120 U. S., 255.

The COURT: Yes. Without passing either way upon that question, as I understand it, in a case which came from the Court of Claims, it says that it is certainly not an independent organization; that it is a part of the military organiza-

tion. These are the decisions on the subject, one court holding that it is not a part of the army, the other authority holding that it is not a part of the navy, and the Supreme Court of the United States holding that it is not an independent organization, but under the military service of the United States. So that it leaves the matter in rather an uncertain state.

But I think that a careful scrutiny of the statutes on the subject will indicate, at least, if they do not so declare, that, as a general proposition, no one shall enter the military service under the age of twenty-one except by the permission and consent of the parent or guardian.

Now, I do not know that there is much importance to be attached to the sections of the Revised Statutes bearing on this subject, but this is what we find. Under the head of the army, section 1116 says:

"Recruits enlisting in the army must be effective and able-bodied men between the ages of sixteen and thirty-five years at the time of their enlisting."

Section 1117 says:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians."

Then the next section, section 1119, says:

"All enlistments in the army shall be for the term of five years."

Now, whether the statute (1117) intends by using the words "military service" to include service in the navy may be a question. It seems a little singular that in the use of the word in the preceding section it speaks of enlistments in the army, and then the next section, which prescribes the age limit, refers to "military service," and then the next section, or the section after that, speaks again of "enlistments in the army."

Now, I do not decide, but it looks a little singular that the distinction should have been made in those several sections.

Then we come to the statutes respecting the navy, and we find that persons are entitled to enlist between fourteen and eighteen years of age, and so on, with the consent of their parents. Whether that is intended to be an exception to this general statute here in respect to military service is

not, as I have said, entirely clear to my mind; and yet it might be consistent with the general statement of the statutes, which seems to indicate certainly that in the army, and any of its allied forces, those enlisting should be twenty-one years of age, unless they get the consent of their parents, and so on.

Another significant fact is that the naval regulations—and I am not at all satisfied with that argument—but the naval regulations provide that the enlistments of marines shall be in accordance with the regulations for the army. The provision with respect to the enlistment of marines is that their enlistment shall be regulated by the regulations applying to the army in respect to enlistments.

So, taking those facts together, it looks to me as though it meant to provide in regard to the enlistment of marines that they should be twenty-one years of age unless, being under that age, they have the permission of the parent or guardian.

That is the ground upon which I decide the case. As I have said, this matter has been decided by the court in general term. It is before us—the only case that had then been decided—and I do not find anything since then that reflects upon this case at all. The Morrissey case does not in my judgment reflect upon this case, because it expressly decides that that law was for the benefit of the parent or guardian, and that the minor could not take advantage of it, and therefore that is as far as the Morrissey case goes.

But the case in 7th Howard was before the general term, in which Chief Justice Carter, and Justices McArthur and James sat, and they had that 7th Howard case before them. That is the case which is supposed to decide that the Marine Corps is a part of the navy. Now, in that case they had peculiar facts before them. It was a case in which a man was on a ship and so on and had re-enlisted. As I say, the general term had that case before them; it filed an exhaustive and careful opinion in the case; it considered the Supreme Court case and then found—and other courts have repeatedly found—that the statute relating to enlistment in the naval service, requiring applicants to be between fourteen and eighteen years of age, does not apply to the Marine Corps.

I cannot see that because the general statutes of the United States say that the Marine Corps shall be under the

regulations of the navy that therefore it is not an independent organization; and while the regulations of the navy apply to it, it does not seem to be the regulations in respect to enlistment, but, rather, it seems to intend that recruits shall be subject to the regulations of the navy only after they become a part of the Marine Corps. When they become such, they are of course subject to whatever regulations the Secretary of the Navy may provide, he acting always for the President. I have examined the brief of the representatives of the officer who is summoned here, and also the brief for the petitioner, and I cannot see any reason why I should undertake to overrule an opinion of the general term of this court, an opinion which is most carefully prepared, and in which all cases up to that time have been examined, and, I think, carefully examined.

I feel, therefore, that I am justified in this case in holding to the position taken by the general term. There is nothing so far as I can see that would warrant me in holding in a different way from that decision, and therefore I think the petitioner in this case should be discharged, and I so order.